Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1514

BALTIMORE REBUILDERS, INC.,
Petitioner,

v.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL ASSOCIATION OF MACHINISTS NATIONAL PENSION FUND (AFL-CIO), *et al.*,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

This case presents an issue of crucial financial importance to employers and employees who rely upon the fair and uncoercive administration of pension plans to which they contribute billions of dollars.

Petitioner, Baltimore Rebuilders, seeks review of the judgment of the United States Court of Appeals for the Fourth Circuit, entered on December 28, 1979. The

Court of Appeals affirmed the National Labor Relations Board's dismissal of a complaint issued against the International Association of Machinists and Aerospace Workers, AFL-CIO and its pension fund.

The Court of Appeals and the National Labor Relations Board held that union cancellation of accumulated pension credits for workers in a unit that decertifies its collective bargaining agent, is neither restraint nor coercion of employee Section 7 rights in violation of Sections 8(b)(1), (2) of the National Labor Relations Act.

OPINIONS BELOW

The opinion of the National Labor Relations Board, reported at 235 NLRB 209 (1978), is reproduced in the Appendix (35a).[1] The opinion of the United States Court of Appeals for the Fourth Circuit, not yet reported, also appears in the Appendix (39a).

JURISDICTION

The judgment of the Court of Appeals was entered on December 28, 1979, and this petition is filed within 90 days of that judgment. The Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether forfeiture of worker past service pension credits solely on account of union decertification is restraint, coercion and discrimination in violation of

[1] "a" references in this Petition are to the accompanying appendix. "App. Ex." and "App." references are to the separate printed Joint Appendix Exhibit and Joint Appendix in the United States Court of Appeals for the Fourth Circuit.

§§ 8(b)(1), (2) of the National Labor Relations Act. 29 U.S.C. §§ 158(b)(1), (2).

STATUTORY PROVISIONS INVOLVED

Relevant portions of Sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157, 158, are set out in the Appendix (1a).

STATEMENT OF THE CASE

Baltimore Rebuilders is in the business of rebuilding carburetors and employs over forty workers. Because the workers decertified their union, they lost all credit for contributions made to the union pension plan.

While approximately $20,000 in contributions made over a four year period on behalf of the employees represents less than 0.02% of the assets of the Intervenor, International Association of Machinists (AFL-CIO) National Pension Fund ("Fund"), the value of all assets held by the Fund runs well over $83 million (Form LM-2, Labor Organization Annual Report 1978). While the Fund has four employer trustees and four union trustees, neither Baltimore Rebuilders nor its employees are trustees and the Fund is essentially instituted and run under the auspices of the Union. In fact, over $320 billion dollars in worker equity is tied up in union operated pension plans similar to the one involved in this case. A. Raskin, *Pension Funds Could Be the Unions' Secret Weapon*, Fortune 64 (Dec. 31, 1979). The magnitude of this economic power makes apparent the potential for union coercion. *See: Pension Fund Holdings Cited as Boycott Weapon*, AFL-CIO News 18 (Nov. 24, 1979).

The two collective bargaining agreements approved by Petitioner Baltimore Rebuilders and Lodge #199 of District #12, International Association of Machinists and Aerospace Workers, AFL-CIO, ran consecutively for three years each from January 1970 to January, 1976. Pursuant to these contracts, Petitioner contributed money to the Intervenors on behalf of the employees from February 1, 1972 to January 29, 1976. However, upon termination of the second collective bargaining agreement, no contract was approved, and a strike ensued. In April, 1976, the National Labor Relations Board ("NLRB") held an election initiated by Petitioner's employees in which they decertified the union representatives (App. Ex. 63, 74). By letters dated August 12, and August 24, 1976, the Fund Administrator notified Petitioner's employees that because they had decertified their local union, the Rules and Regulations of the Fund (Article IX, Section 4) called for retroactive cancellation of their past service pension credits (App. Ex. 64, 65).

As a result of this contractual provision the decertification vote triggered total deprivation of employee benefits under the pension plan to which their employer had contributed approximately $20,000.

The Fund officials treat employees differently, depending on why the relationship with the union was terminated. Article IX of the Fund Rules and Regulations imposes forfeiture of employee benefits in the instant case where the business is a going concern and the relationship with the union is terminated. However, the Fund allows past service credits to employees where both the business and the union relationship are terminated. In fact, if an employer goes out of business before 48 months elapse, the Fund pays employees actuarially-

reduced benefits to the extent of their employer's contribution to the plan (App. Ex. 73, 74).

Indeed, decertification is virtually the only event not covered by the Fund's Article IX saving clauses to prevent cancellation of credited service. Covered employees can save their credits under the following circumstances:

(1) Ceasing employment with their employer 24 months before the contributions end; or

(2) Leaving employment with that employer within 30 days after the termination of the relationship with the union; or

(3) Transferring to another union lodge; or

(4) Earning at least five (5) years of future service credit at any time within the next eight (8) years; or

(5) Having pensions vest before the termination of the relationship with the union; or

(6) Providing their employer goes out of business.

(App. Ex. 54-55).

Unfortunately, the "going concern" technicality cost the Baltimore Rebuilder employees their benefits. In the instant case, even though the employer had contributed to the Fund for less than 48 months, the employees lost all their past service credits simply because Baltimore Rebuilders remained in business instead of going under subsequent to the union decertification. The employees were totally deprived of all possible benefits under the pension plan. Ironically, had Petitioner closed down, its employees would at least have retained pension benefits to the extent of the $20,000 in contributions made to the Fund.

REASONS FOR GRANTING THE WRIT

I.

THE *DANIEL* PRESUMPTION THAT ERISA WILL PROTECT EMPLOYEE PENSION RIGHTS IS VULNERABLE TO FORFEITURE CLAUSES BY UNION OFFICIALS.

Petitioner expects that, absent certiorari by this Court, all union pension funds will quickly revise their plans to provide this new avenue of discrimination against employees. In *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979), this Court refused to extend the anti-fraud provisions of the securities laws to pension plans. In so holding, the Court found that the existence of the Employee Retirement Income Security Act, 29 U.S.C. § 1001-1381 ("ERISA"), obviated all necessity to fill a regulatory void to protect worker rights. Unfortunately, the instant case belies the vitality of such protection.

This is the first case to arise since *Daniel* that underscores the need to protect workers from union pension plan abuse. As a result of the National Labor Relations Board decision in this case, federal labor laws are also circumscribed and useless when applied to union pension plans. Unless the Court of Appeals is reviewed, there will be no independent restraint upon coercive action taken gainst employees by unions through their pension plans.

ERISA makes no attempt to control open-ended pension plan provisions whose ultimate result is to punish recalcitrant employees. Financial integrity to pay recipients is ERISA's overriding public interest. 29 U.S.C. § 1001. But, ERISA's loopholes should not be the basis of arbitrary union penalties—the position that union officials and the NLRB have adopted.

Theoretically, the National Labor Relations Act ("NLRA") should protect employees from union pension reprisals. The NLRA is designed to insulate employee employment rights from retaliation for exercising their organizational rights. 29 U.S.C. § 157; *Radio Officers Union v. NLRB*, 347 U.S. 17, 40 (1954). Regrettably, this case finds the NLRB siding with union officials and against employees.

The significance of these rights in the instant case cannot be minimized. Under the national labor principle of exclusive representation, bargaining and grievance representation by the NLRB-certified representative is mandatory. *J. I. Case Co. v. NLRB*, 321 U.S. 678 (1944). Bargaining by individual employees is strictly prohibited and dissatisfied employees who circumvent their exclusive representatives are not only subject to legal action, but are unprotected as to their concerted activities and may be fired without recourse. *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 72 (1975); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 192 (1967).

Unless this Court grants certiorari, issuance of complaints against union pension plan forfeitures will be barred in the future. The General Counsel's official position now is that union pension plan cancellation provisions will no longer be deemed violative of the Act. 117 Daily Lab. Rep. A-4 (1978). *See, e.g., Genuine Parts Co.*, NLRB Region 19 (1978) (complaint withdrawn by General Counsel where union cancelled employee pension benefits upon decertification).

Ironically, where *employer* action cancels worker pension benefits as a result of a union representation vote, the NLRB has held, without exception, that the action is coercive within the meaning of the NLRA.

Kroger Co. v. NLRB, 401 F.2d 682 (6th Cir. 1968); *Motor Wheel Corp.*, 180 NLRB 354 (1969); *Goodyear Tire & Rubber Co.*, 170 NLRB 539 (1968); *International Harvester Co.*, 169 NLRB 787 (1968); *Jim O'Connell, Inc.*, 123 NLRB 1639 (1959).

The First Amendment guarantee to citizens of their fundamental freedom of choice is preserved in the NLRA. This freedom is so basic to our system that any violation must be challenged. As stated by this Court, "because the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Harper v. Virginia Board of Elections*, 383 U.S. 663, 667 (1966); *Elrod v. Burns*, 427 U.S. 347, 462 (1976) (significant impairment of First Amendment rights must undergo exact scrutiny).

This right is as viable within the factory as it is without. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 277-78 (1973). Section 7 specifically protects worker freedom of choice in the right to "form, join or assist unions," and the collateral right "to refrain from any and all such activities." *Savair*, at 278, *citing* 29 U.S.C. § 157.

However, neither the Board, nor the Court of Appeals addressed the disparity in protecting the worker franchise from employer pension forfeiture, but not union pension plan forfeiture. Under this double standard, legal protection depends upon who is the perpetrator of the violation, management official or union boss. This is not equal protection of the law.

The action also departs from the Board's theoretically neutral role of referee, *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 278 (1978), and now transforms it into an advocate for privileged action by union officials.

The notion that union officials should occupy a privileged station in the law is inconsistent with this Court's position. *Connell Constr. Co. v. Plumbers & Steamfitters, Local Union No. 100*, 421 U.S. 616 (1975). Union officials may not commit acts which are "unrelated to the union's legitimate goals." 421 U.S. at 624. Reprisal on account of decertification is not a legitimate goal.

II.

DISPARATE NLRB TREATMENT OF PENSION FORFEITURES UNLAWFULLY COERCES WORKERS WHO DECERTIFY THEIR UNION REPRESENTATIVE.

The case at bar presently stands for the proposition that employees who vote for union decertification will be given less protection by the Board than employees who vote for union certification. If worker free choice has any real meaning, there is no justification for punishing infringement of the franchise by some, but excusing infringement by union officials. It is the position of Petitioner and was formerly that of General Counsel before the National Labor Relations Board that the union officials violated Section 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act when they automatically cancelled pension credits solely because the employees elected to decertify their union.

Unfair labor practices occur when a labor organization or its agents (1) . . . restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title . . ." (1a). These unfair practices include a union's discriminatory action against employees or the union's causing employers to discriminate against employees. NLRA, § 8(b)(2). The Court of Appeals found that the terms of the pension plan evidenced no

unfair labor practice because the pension forfeiture applied evenly to all unit employees regardless of whether they voted to keep the union in or out. Yet, retribution applied evenly is just as coercive, and clearly just as effective, in discouraging all employees from voting to decertify.

Further, the union's coercive encouragement of union membership is the *sine qua non* of a § 8(b)(2) violation, *NLRB v. Milk Drivers and Dairy Emp., Local 1338*, 531 F.2d 1162, 1166 (2d Cir. 1976), and a violation will be sustained unless the union presents evidence of legitimate and substantial business reasons for applying disparate treatment. *NLRB v. Great Dane Trailers, Inc.*, 338 U.S. 26, 34 (1967). The union fund officials interposed in this case that encouragement of voluntary continuation in the plan was necessary to limit the unfunded liability represented by past service credits. Yet when it comes to limiting liability there is a clear distinction between the positive requirement that employees gain sufficient credits for their pensions to vest, and the negative requirement that all credits be forfeited on the occurrence of a certain event. The former is a proper purpose, while the latter is improper and harsh.

The only possible way for employees to save their credits in the event of decertification is to quit their jobs. The Fund encourages employees to quit within thirty days to salvage their pension credits by permitting employees to recover their credits if they resign their present employment or work for five of the following eight years with a contributing employer. But quitting a job is no choice, it's coercion. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 196 (1967).

The discrimination against employees who choose to decertify the local union permeates the Fund's forfeiture

provision and "constitutes a patent, clear impediment to a free exercise of the rights guaranteed by Section 7 of the Act." *See: Farmbest, Inc.*, 154 NLRB 1421, 1454 (1965) (automatic termination of employer pension benefits on account of representation election unlawful).

The facts in the instant case clearly indicate that employees are penalized whenever they vote to decertify their union. The Fund Administrator testified that the Article IX Cancellation provision was written to "increase the incentive for employees covered by the Fund to prevent, whenever possible, withdrawal from the fund by active employees." (App. Ex. 62, paragraph 8, 168-170). There are only two ways for employees to pursue this so called "incentive." First, they could refrain from voting the union out and, second, they could refuse to vote in favor of a collective-bargaining agreement lacking discriminatory union pension provisions. As a practical matter, the latter occurrence would be unusual because the union would have to abandon its own pension plan, an act it vehemently objects to.

The preferable, but unoffered choice is for the union fund officials to maintain service credit records for employees who decertify. They keep the records at least eight years for everyone else. Obviously, it is more trouble to erase the members' pension accounts than to leave them on the books.

The penalty is clear on its face. Unfair labor conduct speaks for itself when it is discriminatory and influences employee free choice, and no claim of justification can override the unavoidable and foreseeable consequences which must have been intended. *NLRB v. Erie Resistor Corp.*, 373 U.S. 225, 228 (1963). An affirmative showing of improper motive had been made out, thereby rebutting any inference that the cancellation clause,

effective only upon decertification, was "prima facie lawful." *See: NLRB v. Great Dane Trailers, Inc.*, 338 U.S. 26, 34 (1967). Specific evidence of intent is "not an indispensable element of proof of violation." *Erie Resistor Corp.*, at 227.

Further, the evidence belies the argument that the union fund officials would be giving an advantage to Petitioner's employees. Apparently, the Fund incurs no added financial burden in paying employees pension benefits to the extent of the actuary liability represented by employers contributing less than 48 months due to business failure. Rather, the cancellation provisions, as to Petitioner's employees, are inherently discriminatory. *Erie Resistor Corp.*, at 228. It is entitled to no protection.

III.

THE COURT OF APPEALS IMPROPERLY APPLIED A SUBJECTIVE STANDARD OF REVIEW TO THIS UNION PENSION PLAN FORFEITURE PROVISION.

The Court below applied the wrong test to determine restraint and discrimination in this case. The Fourth Circuit focused on finding intent, "true purpose" or "real motive," to violate the NLRA, citing *Local 357, International Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 675 (1961). The test for violation of § 8(b)(1) is whether the Fund's Title IX anti-selection provision may tend to restrain or coerce employees whenever they may exercise their § 7 rights, not whether the union officials *intended* to coerce them. The Fourth Circuit's reading of Supreme Court opinions misses the locus in time of the charge in this case.

The Court of Appeals believed the substance of Petitioner's complaint to be that the provision dictated employee choice at a particular point in time. It then found that subsequent cancellation did not overwhelm nor intimidate an employee in the free exercise of Section 7 rights (52a). However, the Complaint was not limited to the post-cancellation period nor to the time of voting, but alleged that the maintenance and enforcement of Article IX had restrained and coerced employees in the exercise of their rights under § 7 of the NLRA (App. 9).

The Fourth Circuit focused on coercive animus in the subsequent letters of cancellation mailed to employees following their union decertification, but those letters were hardly the only form or occasion of § 8(b)(1) coercion and restraint alleged. (App. 40).

The lower court's narrow view of the time period and types of coercion was unfounded. The cancellation letter was held not in itself threatening nor coercive within the meaning of the Act, because it was sent well after the election (50a). This *ex post facto* test of coercion is clearly the wrong view.

It is inconsequential that the employees did not feel "coerced" at that particular point in time, because they may surely have found the letters retributive. Actual coercion or restraint is not required for a violation of § 8(b)(1)(A). The test is whether the act or provision "may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Local 542, International Union of Operating Eng. v. NLRB*, 328 F.2d 850, 852 (3d Cir. 1964), *cert. denied*, 379 U.S. 82 (1964). The misconduct need not prove effective. Thus, the test here is whether the provisions for cancelling past service credits on account of decertification

reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.

It is important to note that the limited focus on union coercion in the decision below seemed to assume that a union induced *employer* unfair labor practice was an essential element of a violation. This approach was incomplete and off point. For example, the following statement was made in the ALJ decision (26a):

> "Although neither employer has been charged, nevertheless, in order for General Counsel to prevail in these cases the evidence must establish a violation of *Section 8(a)(3).*" [Emphasis added.]

Yet the gravamen of the Complaint was § 8(b)(1) *union* coercion of employees through employer pension contributions; § 8(a)(3) employer coercion is an ancillary element at best, and in this case, not even necessary. Making out a complaint for § 8(b)(2) union coercion does not require that the employer in fact be influenced by the union discriminatory action.

Nevertheless, the Court of Appeals search for some sort of justification for the union action only compounds the error of their subjective test. Thus, it somehow found a legitimate business purpose to limit past service credits upon decertification (52a). But the "limitation" in this case was total forfeiture.

Forfeiture provisions have never been a favored course of action and have been looked upon as extreme action to prevent imminent dissolution. Examination reveals that the financial integrity of this Fund is in no imminent danger and therefore does not require forfeiture of past service credit to prevent termination of participation. The sanction is invidious. *Norton v. I.A.M. Nat'l Pension Fund,* 553 F.2d 1352, 1358 (D.C. Cir. 1977).

Indeed, forfeiture has had no consistent purpose with this Fund. Until July 1, 1973 the Fund forfeited only past service credit when active contributing employers withdrew. Then in July, 1973, it applied forfeiture to past and future service. And less than a year and a half later, in December 1974, it flip-flopped back to forfeiture of only past service credit.

Even if a subjective standard of review were proper, the union officials' own conduct makes it difficult to accept the argument that forfeiture is necessary to maintain the financial integrity of the Fund. The Fund has not laid "in the eligibility provisions a reasonable predicate of required contributory employment before [it] resort[s] to the use of forfeitures as a means of preserving the fund for the benefit of contributors." *Roark v. Boyle,* 439 F.2d 497, 508 (D.C. Cir. 1970). No such justification exists in this case because the Fund cannot explain away the different treatment accorded bankrupt and solvent employer contributions.

Employees lose tremendous benefits and union officials gain in such a case as this. Billions of dollars of hard-earned money is available for coercion by union officials. *New Weapons for Bashing Bosses,* Time 18 (July 23, 1979); *Pension Power: Meet the New Masters of American Industry,* Saturday Rev. 11 (Sept. 2, 1978).

Employer contributions do not disappear upon a termination of employee participation in a pension fund. *Roark v. Lewis,* 401 F.2d 425, 428 (D.C. Cir. 1968). The union fund officials recognize this reality here, for they apply employee service credits actuarially even in the case of short term contributing employers who go out of business and end their relationship with the union (Article IX, Section 3) (App. Ex. 54). It is simply unfair for employees to forfeit these benefits merely because

the union relationship ends, but the employer stays in business. The union fund officials applied this rule against Petitioner and its employees. On its face it is an arbitrary and capricious application of a financial justification to inhibit the exercise of Section 7 rights. *Norton v. I.A.M. Nat'l Pension Fund,* 553 F.2d 1352, 1356 (D.C. Cir. 1977).

The Court of Appeals interpretation gives effects to the Fund's cancellation provision that go well beyond the facts of the case. Indeed, the Court of Appeals and the NLRB have now stamped union pension reprisals with the imprimatur of legality. While only $20,000 is involved in this case, billions of dollars of union pension money is available for coercion. Union pension plans lacking the decertification reprisal provision will surely incorporate this avenue of discrimination absent certiorari from this Court.

Accordingly, unless this honorable Court reviews the decision of the United States Court of Appeals, workers will be subject to unfair and unequal treatment upon exercise of their associational and organizational right to join or refrain from unionization.

CONCLUSION

For these reasons, Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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March 27, 1980

Appendix

APPENDIX A

STATUTORY PROVISIONS INVOLVED

The pertinent sections of the National Labor Relations Act are:

29 U.S.C. § 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158(b):

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom

membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
Washington, D.C.

Case 5-CB-2096

LODGE #199 OF DISTRICT #12, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO; INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO; I.A.M. NATIONAL PENSION FUND AND ITS TRUSTEES, AGENTS OF THE AFOREMENTIONED UNIONS

and

BALTIMORE REBUILDERS, INC.

Case 5-CB-2211
(Formerly 13-CB-6632)

LODGE 170, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO; INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, AGENT OF RESPONDENT; I.A.M. NATIONAL PENSION FUND AND ITS TRUS-

TEES, AGENTS OF RESPONDENT (DAHL'S AUTO RECONSTRUCTION COMPANY, INC.)

and

ROSWELL K. PETERSON and EARL KELLEY,
Individuals

DECISION

STATEMENT OF THE CASE

HERBERT SILBERMAN, Administrative Law Judge: These proceedings, consolidated by an Order of the Regional Director for Region 5, issued on April 22, 1977, were heard in Washington, D.C., on June 16 and July 25, 1977. Following the close of the hearing briefs were filed with the administrative Law Judge on behalf of General Counsel, Respondent Pension Fund, and the Union Respondents. In addition, pursuant to leave granted the parties, a supplemental memorandum was filed on behalf of General Counsel.

THE PLEADINGS

CASE 5-CB-2211

R. K. Peterson and Earl Kelley on April 15, 1976, filed a charge of unfair labor practices against Lodge 170, International Association of Machinists & Aerospace Workers, AFL-CIO, herein called Lodge 170, which was served on Lodge 170 on April 16, 1976. The charge states that Lodge 170 has violated Section 8(b)(1)(A) and (2) by its individual conduct "and/or by conduct of the trustees of the I.A.M. Pension Fund [sic] as agent for" Lodge 170. Neither the I.A.M. National Pension Fund

nor its Trustees was served with a copy of the charge.[1] Pursuant to said charge a complaint, dated March 1, 1977, was issued by the Acting Regional Director for Region 13 which named in its caption as Respondents: Lodge 170 "Associated with International Association Fund and Its Trustees, Agents of the Aforementioned Unions." Answers to the complaint were filed by Lodge 170 and by the Pension Fund and its Trustees. Thereafter, an order, dated March 14, 1977, was issued by the General Counsel transferring the case from Region 13 to Region 5.

An amended complaint, dated April 21, 1977, was issued in the case by the Regional Director for Region 5 which names Lodge 170 as Respondent, and AFL-CIO, herein called the International, as "agent of Respondent" and I.A.M. National Pension Fund and its Trustees as "agents of Respondent." The amended complaint states that it was charged that Lodge 170 "and its agents," the International and the Pension Fund and its Trustees, have engaged in unfair labor practices. However, the only applicable charge, which is dated April 15, 1976, nowhere refers to the International and refers to the Pension Fund and its Trustees not as the "labor organization or its agents against which charge is brought," but in the description of the events upon which the charge is based as having engaged in the complained of

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[1] Although the Agreement and Declaration of Trust pursuant to which the trust fund here in question was created contemplates only one legal entity, namely, the Trustees, herein called the Trustees, and declares that the I.A.M. National Pension Fund, herein referred to as the Pension Fund, "shall mean generally the money or things of value which comprise the corpus and additions to the Trust Fund," the parties hereto do not dispute that the Pension Fund may be named as a party respondent in these proceedings. *See* 29 U.S.C.A. Sec. 1132(d)(1).

conduct "as agents for" Lodge 170. In substance, the amended complaint alleges that "certain employees" of Dahl's Lodge 170 from 1951 until July 15, 1975, when such representation came to an end following a decertification election held on June 3, 1975; from August 1, 1966, to July 15, 1975, pursuant to the terms of collective-bargaining agreements with Lodge 170, Dahl's was a contributing employer to the Pension Fund; and that on October 21, 1975, the Pension Fund and its Trustees "declared a forefeiture of rights" of the employees of Dahl's "including forefeiture of all past service credit accumulated by covered employees . . . because the employees of [Dahl's] voted to decertify" Lodge 170. According to the amended complaint, the Pension Fund's plan provides, *inter alia,* that "past service credit is forfeited where employer participation ceases as a result of when an employer goes out of business and neither it nor its successor remains in the same or in a related business." The amended complaint further alleges: (a) That Lodge 170 has restrained and coerced employees of Dahl's in the exercise of the rights guaranteed in Secton 7 of the Act and has caused Dahl's to discriminate against its employees by the unlawful maintenance and enforcement of the described provision (Art. IX, sec. 4) of the pension plan; and (b) that Lodge 170 "and the Agents of" Lodge 170 have engaged in and are engaging in unfair labor practices as defined in Section 8(b)(1)(A) and (2) of the Act.

The Pension Fund and its Trustees duly filed an answer to the amended complaint in Case 5-CB-2211 which denies that they have engaged in the alleged unfair labor practices and which asserts as affirmative defenses:

1. The charge upon which the complaint is based was not filed within 6 months of the occurrence of the alleged unfair labor practices complained of.

2. The Board is without jurisdiction over the Pension Fund and its Trustees because, for the purposes of the proceeding, they are neither an employer, a labor organization, nor an agent of either.

3. The Board lacks jurisdiction over the subject matter the proceeding because the structure of the Pension Fund is prescribed by Section 302(c)(5) of the National Labor Relations Act, as amended, and the substantive standards of the plan administered by the Trustees are prescribed by the Employee Retirement Income Security Act of 1974, 29 U.S.C.A. Secs. 1001, *et seq.*

4. Dahl's which is a necessary party to the proceeding because Dahl's as well as Lodge 170 executed all the agreements and instruments necessary to provide coverage for Dahl's employees under the applicable pension plan, and is "an equal partner in all the agreements securing . . . participation," has not been charged and therefore full and complete relief from the violations complained of will be unavailable.

Lodge 170 duly filed an answer to the amended complaint in Case 5-CB-2211 denying that it has engaged in the alleged unfair labor practices and asserting as affirmative defenses that:

1. The Board does not have jurisdiction over the subject matter of the proceeding by reason of the passage of the Employee Retirement Income Security Act of 1974.

2. The charge in the proceeding was untimely filed as any alleged unfair labor practice commenced on September 2, 1975.

An amended answer to the complaint and the amended complaint in Case 5-CB-2211 was filed on behalf of Lodge 170 and the International in which it is averred that through inadvertence the prior answers failed to include the International as one of the answering parties and that the answers theretofore filed for Lodge 170 are adopted by the International as its answers in the proceeding.

CASE 5-CB-2096

In Case 5-CB-2096 the charge which was filed by Baltimore Rebuilders, Inc., herein called Baltimore Rebuilders, on October 12, and served on October 13, 1976, names as the "labor organization or its agents against which charge is brought": Lodge #199 of District #12, International Association of Machinists & Aerospace Workers, AFL-CIO, herein called Lodge #199, the International, and the I.A.M. National Pension Fund. It alleges that the charged parties have engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act. A complaint thereon was issued on April 21, 1977.[2] In substance, the complaint alleges that since 1970 Baltimore Rebuilders and Lodge #199 have been parties to collective-bargaining agreements the last of which expired on January 29, 1976; that, pursuant to such agreements, as of February 1, 1972, Baltimore Rebuilders became a contributing employer to the Pension Fund with respect to the employees covered by its collective-bargaining agreements; that in consequence of an election held on April 23, 1976, Lodge #199 was decertified as collective-bargaining representative of the

[2]Although the charge does not name the Trustees as a respondent, the complaint alleges that the Pension Fund and its Trustees as agents of the Unions are respondents in the case.

employees of Baltimore Rebuilders; and that by letters dated August 12, and 24, 1976, the Trustees notified Baltimore Rebuilders, its employees, and Lodge #199 that the effect of the decertification vote was to terminate "participation and pension coverage" for the "covered employees" and to cause loss of all past service credit pursuant to the terms of the pension plan (Art. IX, sec. 4). The complaint also alleges that past service credit is forfeited when employer participation ceases as a result of decertification, but is not forfeited when an employer goes out of business and neither it nor its successor remains in the same or in a related business. The complaint further alleges that the Respondents have restrained and coerced employees of Baltimore Rebuilders in the exercise of rights guaranteed in Section 7 of the Act and have caused Baltimore Rebuilders to discriminate against its employees "by the unlawful maintenance and enforcement of Article IX, Section 4" of the pension plan and thereby the Respondents have engaged in unfair labor practices as defined in Section 8(b)(1)(A) and (2) of the Act.

The Pension Fund and its Trustees duly filed an answer to the complaint denying that they have engaged in the alleged unfair labor practices and asserting as affirmative defenses that:

1. The Pension Fund and its Trustees are neither an employer nor a labor organization within the meaning of Section 2(2) and (3) of the Act, nor are they agents of either and therefore the Board lacks jurisdiction over them.

2. The complaint against the individual Trustees is deficient because the charge on which the complaint is based does not allege that the Trustees were persons

who have engaged in or are engaging in any unfair labor practices as required by Section 10(b) of the Act.

3. The Board lacks jurisdiction over the subject matter of this proceeding because the structure of the Pension Fund is prescribed by Section 302(c)(5) of the Act and the substantive standards governing operation of the Pension Fund are prescribed by the Employee Retirement Income Security Act of 1974.

4. Baltimore Rebuilders, who has not been charged in the proceedings, is a necessary party thereto.

Lodge #199 and the International duly filed an answer denying that they have engaged in the alleged unfair labor practices.

Upon the entire record in these cases, I make the following:

FINDINGS OF FACT

I. Jurisdictional Findings

Baltimore Rebuilders, a Maryland corporation, is engaged in the manufacture and wholesale distribution of rebuilt carburetors at its place of business in Baltimore, Maryland. During a representative 12-month period Baltimore Rebuilders purchased materials and supplies valued at in excess of $50,000 which were shipped to its Maryland location through channels of interstate commerce from points outside the State of Maryland, and sold products valued in excess of $50,000 which were delivered to locations outside the State of Maryland. The parties stipulated, and I find, that Baltimore Rebuilders is an employer as defined in Section 2(2) engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Dahl's, an Illinois corporation, is engaged in the repair of automobiles at its place of business in Highland Park, Illinois. During a representative 12-month period Dahl's purchased materials and supplies valued at in excess of $50,000 which were shipped to its Illinois location through channels of interstate commerce from points outside the State of Illinois. The parties stipulated, and I find, that Dahl's is an employer as defined in Section 2(2) engaged in commerce within the meaning of Section 2(6) and (7)of the Act.

The parties stipulated, and I find, that Lodge #199 and Lodge 170, which are chartered locals of the International, and the International are all labor organizations within the meaning of Section 2(5) of the Act.

The parties stipulated that the I.A.M. National Pension Fund (formerly the I.A.M. Labor-Management Pension Fund) is a trust fund with its principal office and place of business in the District of Columbia and was created and exists pursuant to an agreement and declaration of trust entered into by the International and various employers who employ members of the International.

II. The Alleged Unfair Labor Practices

A. *Baltimore Rebuilders*

On December 22, 1969, District #12, International Association of Machinists and Aerospace Workers, AFL-CIO, was certified by the Board in Case 5-RC-7011 as the collective-bargaining representative of a unit composed of all production and maintenance employees of Baltimore Rebuilders. Thereafter, Baltimore Rebuilders and Lodge #199 of District 12 entered into a collective-bargaining agreement for a 3-year term from January 29, 1970, through January 29, 1973. The

agreement required Baltimore Rebuilders to make payments to the Pension Fund for the employees in the certified unit beginning on January 29, 1972, and continuing for the duration of the agreement and for any renewals or extensions thereof. In February 1970 Baltimore Rebuilders and Lodge #199 signed the I.A.M. Labor-Management Pension Fund Agreement and Declaration of Trust dated May 1, 1960, as amended, through January 17, 1968, and also signed the Pension Fund's Standard Form of Participation Agreement. As of the date Baltimore Rebuilders began making contributions to the Fund its represented employees became "covered employees" pursuant to the rules and regulations of the plan promulgated by the Trustees of the Fund.

The collective-bargaining agreement between Baltimore Rebuilders and Lodge #199 was duly extended until January 29, 1976. Thereafter, in an election conducted on April 23, 1976, pursuant to a petition filed on March 11, 1976, in Case 5-RD-525, the employees of Baltimore Rebuilders voted to decertify Lodge #199 as their collective-bargaining representative and a Certification of Results of Election was issued on May 3, 1976, by the Regional Director for Region 5.

The collective-bargaining agreement between Lodge #199 and Baltimore Rebuilders was not renewed following its termination on January 29, 1976, and Baltimore Rebuilders then ceased contributing to the pension Fund. Thereafter, the administrator of the Pension Fund advised Baltimore Rebuilders, the covered employees, and District Lodge #12 what effect termination of participation in the pension plan on the part of Baltimore Rebuilders had on the pension benefits of its employees by a letter dated August 12, 1976, which was corrected

on August 24, 1976. The pertinent portion of the corrected letter reads:

> We have been advised that the I.A.M. bargaining unit employees of Baltimore Rebuilders, Inc. have decertified I.A.M. District Lodge No. 12 as their bargaining agent. The effect of this is to terminate participation and pension coverage for the Covered Employees of Baltimore Rebuilders, Inc. The effective date of termination is January 29, 1976, the expiration date of the last collective bargaining agreement. Under Article IX, Section 4 of the Rules and Regulations of the I.A.M. National Pension Fund, Benefit Plan A the following shall apply:
>
> 1. For Covered Employees of Baltimore Rebuilders, Inc. all Past Service Credit based on employment with the employer shall be cancelled retroactively notwithstanding any contrary provision of the Plan.
>
> 2. Past service shall not be cancelled for any Covered Employee whose employment with such employer terminates within 30 days of the employer's termination (by February 29, 1976), OR if the Covered Employee terminated his employment 24 months prior to the company's termination of participation date.
>
> 3. Covered Employees shall have their Past Service Credit reinstated if they earn at least five (5) years of Future Service Credit at any time within the eight (8) year period following the Termination of Participation.
>
> In the spirit of the Employees Retirement Income Security Act of 1974, we are enclosing two extra copies of this letter for bulletin board posting and request the employer's assistance in making sure that this notice is posted. In addition, we

are mailing a copy of this letter to all Covered Employees for whom we have an address.

Printed in small type at the bottom of the letter is the following:

> The Pension Fund Cannot Assume Responsibility For This Preliminary Interpretation Of The Rules And Regulations Of The I.A.M. National Pension Plan, Only The Trustees Can Officially Interpret The Pension Plan And They May Change Or Amend The Pension Plan From Time To Time Without Prior Notice.

B. *Dahl's*

Dahl's and Lodge 170 were parties to successive collective-bargaining agreements from 1951 until July 15, 1975. On September 8, 1966, these parties executed the I.A.M. Labor-Management Pension Fund Agreement and Declaration of Trust dated May 1, 1960, as amended, through July 20, 1965, and the Pension Fund's standard form of participation agreement which provided for payments to the Pension Fund commencing on October 1, 1966, for the employees of Dahl's in the collective-bargaining unit, including Charging Parties Peterson and Kelley.

In an election conducted on June 3, 1975, pursuant to a petition filed in Case 13-RD-1008 on April 23, 1975, Dahl's employees voted to decertify Lodge 170 as their collective-bargaining representative and a Certification of Results of Election was issued on June 11, 1975, by the Regional Director for Region 13.

Thereafter, the Pension Fund's administrator mailed a two-page letter, dated September 2, 1975, to Dahl's and to District Lodge 170 which, in pertinent part, reads:

We have received a copy of the Decertification Notice dated June 3, 1975 from the National Labor Relations Board which advises that the I.A.M. Bargaining Unit Employees of Dahl's Auto Reconstruction Company have decertified the I.A.M. District Lodge #140 [sic] as their Bargaining Agent effective July 15, 1975, the expiration date of the current Collective Bargaining Agreement.

The effect of the decertification is to terminate participation and coverage for the Covered Employees at Dahl's Auto Reconstruction Company. Article IX, Section 4 of the Rules of the I.A.M. National Pension Fund, Benefit Plan A therefore, apply. The effective date of the Termination of Participation is July 15, 1975, the expiration date of the Collective Bargaining Agreement.

Under Article IX, Section 4 the following shall apply:

1. For Covered Employees of Dahl's Auto Reconstruction Company, all Past Service Credit based on employment with the employer shall be cancelled retroactively notwithstanding any contrary provision of the Plan.

2. Past Service Credit shall not be cancelled for any Covered Employee whose employment with such employer had ended at least 24 months before the participation of the Contributing Employer terminated OR whose employment with such employer ended within 30 days of the Employer's termination (by August 15, 1975), as the effective date of the termination is July 15, 1975.

In the spirit of the Employee Retirement Income Security Act of 1974, we are enclosing 2 extra copies of this letter for Bulletin Board posting and request the Employer's assistance in making sure that this notice is posted.

At the bottom of each page of the letter the following disclaimer is printed in small type:

> The Pension Fund Cannot Assume Responsibility For This Preliminary Interpretation Of The Rules And Regulations Of The I.A.M. National Pension Plan, Only The Trustees Can Officially Interpret The Pension Plan And They May Change Or Amend The Pension Plan From Time To Time Without Prior Notice.

The contents of the letter came to the attention of the employees of Dahl's including Peterson and Kelley, shortly after it was mailed. Subsequently, by letter dated September 30, 1975, an attorney, William L. Becker, wrote to the Pension Fund's administrator inquiring about the pension rights of Messrs. Peterson and Kelley. In Response thereto on October 21, 1975, the eligibility pension supervisor for the Fund mailed replies to both Peterson and Kelley. Insofar as is material to this case the letters are identical. The reply to Peterson, in pertinent part, is as follows:

> We have received Mr. William L. Becker's letter with your request for information about possible pension benefits from the I.A.M. National Pension Fund, Benefit Plan A.
>
> As you know, the I.A.M. Bargaining Unit Employees of Dahl's Auto Reconstruction Company decertified I.A.M. District Lodge #140 [sic] as their Bargaining Agent effective July 15, 1975. Article IX, Section 4 of the Rules of the I.A.M. National Pension Fund, Benefit Plan A was therefore applied. Please see the enclosed copy of the Termination of Participation letter dated September 2, 1975.
>
> Under Article IX, Section 4, for Covered Employees of Dahl's Auto Reconstruction Company, all Past Service Credit (time *before* a company became a

> Contributing Employer to the Pension Fund) was cancelled retroactively notwithstanding any contrary provision of the Plan. Past Service Credit shall not be cancelled for any Covered Employee whose employment with the employer had ended at least 24 months before the participation of the Contributing Employer terminated OR whose employment with such employer ended within 30 days of the Employer's termination—by August 15, 1975.
>
> If you have worked at Dahl's Auto after August 15, 1975, all Past Service Credit based on employment at Dahl's is cancelled. Your Credited Service would begin with Future Service Credit. Future Service is based on actual contributions made to the Fund for your I.A.M. employment after the Employer's Contribution Date. Dahl's Auto became a Contributing Employer on August 1, 1966. Based on contributions received, from August, 1966 through July 15, 1975, you have accrued a total of 9 years Future Service Credit.
>
> If all of your Past Service Credit based on employment at Dahl's has been cancelled (which will be determined and verified when we are processing an Application for benefits) it can be reinstated provided you earn at least five (5) years of Future Service Credit at anytime within the eight (8) year period following the date the participation of the Contributing Employer terminated. Of course, if you terminated your employment at Dahl's as indicated above, Past Service Credit earned at Dahl's would not be cancelled. Credited Service is *not* based on employment in the industry; it is based on I.A.M. work for Contributing Employers to the Fund.
>
> Without an employment history, we regretfully, cannot give you a more definite answer at this time with regard to your pension rights.

There is printed at the bottom of each of the two pages of the letter the same disclaimer which is quoted above.

C. *The Pension Plan*

Pursuant to an Agreement and Declaration of Trust entered into as of May 1, 1960,[3] between the International and various employers ("of members of the International Union") a pension fund known as the I.A.M. National Pension Fund was established to provide retirement benefits for employees (and their beneficiaries) for whom contributions are made under the terms of collective-bargaining agreements with the International or its locals or district lodges. As authorized by the agreement, a plan was promulgated setting forth a program of pension benefits. (Plan A, which is the Plan involved in these proceedings, was formerly known as the I.A.M. Labor-Management Pension Plan.) The plan which is applicable to these cases provides for pension benefits based upon credited service which means the sum of "past service" and "future service." Past service means periods of employment prior to an employer's contribution date for which pension credit is granted. Future service means periods of covered employment on or after an employer's contribution date for which pension credit is granted. The term contribution date means the first date for which a contributing employer is obligated by a collective-bargaining agreement to make contributions to the Pension Fund.

General Counsel contends that Article IX of the plan, entitled "Termination of Participation," which is concerned with the pension benefits of employees whose

[3]The Agreement and Declaration of Trust has been amended from time to time and was last amended on April 19, 1976.

employer ceases to make contributions to the Pension Fund, is unlawfully discriminatory because past service credit is not cancelled for employees whose employer goes out of business but is cancelled for employees of an employer who continues in business. The article in question reads as follows:

ARTICLE IX.

TERMINATION OF PARTICIPATION

Section 1. General.

The financing of the benefits provided by the Plan is based on the continued contributions from Contributing Employers, as required in the Collective Bargaining Agreements. If a Contributing Employer should fail to make the required contributions, the Pension Plan cannot be continued for the employees of such employer.

In addition, if a Lodge and an employer should enter into a Collective Bargaining Agreement requiring contributions to the Fund, and one or more employees of such Contributing Employer should then retire under the provisions of the Plan, the obligation to contribute to the Plan should continue in effect for a sufficient period of time to enable the Plan to operate on an actuarially sound basis. The purpose of this Article is to set forth the basis for terminating the participation in the Plan of Contributing Employers who are delinquent in their contributions to the Plan, and the basis for termination of past service credit and pension benefits for employees of delinquent employers. In addition, this Article contains the basis for the Trustees to impose penalties by way of denial of pension benefits and past service credit for employees of employers who, under certain circumstances, do not continue to be obligated to

contribute to the Fund in accordance with their Collective Bargaining Agreement with the Lodge.

Section 2. Causes of Termination.

The participation of a Contributing Employer shall terminate:

a. When the employer is no longer obligated by a Collective Bargaining Agreement to make contributions to the Fund on the basis required by the Trustees; or

b. When the Employer fails to pay an amount due the Fund, and termination is deemed appropriate by the Trustees; or

c. When the employer fails to comply with administrative procedures adopted by the Trustees and termination is deemed appropriate by the Trustees.

Section 3. Short Term Contributing Employers.

If within 48 months of its Contribution Date the participation of a Contributing Employer terminates and that employer goes out of business, or if within 48 months of its Contribution Date the number of Covered Employees employed by the Contributing Employer at any time is less than 50 percent of the original number employed on the Contribution Date of the Contributing Employer, then the following actuarial limitations shall apply:

a. Pensioners who formerly were employed by the Contributing Employer shall have their pensions terminated or reduced, if the total amount contributed by the said Contributing Employer, less benefit payments already made, is less than the actuarially determined value of the pension benefits thereafter payable with respect to such Pensioners; and

b. Covered Employees employed at any time by the Contributing Employer shall have their benefits terminated or altered in such manner as the Trustees consider necessary to preserve an actuarially sound relationship between the liability for benefits anticipated for the said Covered Employees involved and the contributions of the said Contributing Employer, after taking into account the existing liability to Pensioners who formerly were employed by the Contributing Employer.

This Section shall not apply to any Covered Employee who has at least five years of Future Service Credit before a break in Covered Employment occurs under Section 3 of Article IV.

Section 4. Withdrawal by Active Employers.

a. If the participation of a Contributing Employer terminates and should that employer, or its successor, thereafter continue in the same or related business, then all Past Service Credit based upon employment with such employer shall be cancelled retroactively, notwithstanding any contrary provision of this Plan.

b. Past Service Credit shall not be cancelled for the following persons:

(1) Covered Employees whose employment with such employer had ended at least 24 months before the participation of the Contributing Employer terminates; or

(2) Covered Employees whose employment with such employer ends within thirty (30) days of the employer's termination; or

(3) Covered Employees in a bargaining unit which is transferred to the jurisdiction of another I.A.M. Lodge, provided that no member of that Lodge is a Covered Employee under this Plan, and the employees' rights under this Plan are vested under Article IV, Section 4.

c. Covered employees shall have their past service credit reinstated if they earn at least five years of future service credit at any time within the eight (8) year period following the date the participation of the Contributing Employer terminates.

d. Pensioners shall not lose their past service credit, if their benefits were effective before the participation of the employer terminates; provided, however, that if the participation of the employer terminates within 48 months of its Contribution Date, then all pensions based upon past service credit with that employer shall be ended or reduced if the total amount contributed, less benefit payments already made, is less than the actuarially determined value of the pension benefits thereafter payable with respect to such Pensioners.

There are approximately 2,000 employers contributing to the pension plan on behalf of about 90,000 employees. The pension plan's past service credit provisions are generous. It is theoretically possible for an employee to retire with 25 years' credited service, the maximum permitted under the pension plan, based upon 24 years of past service credit and only 1 year of future service credit. To ensure the fiscal soundness of the trust fund the pension plan provides, with certain exceptions, for the cancellation of the past service credit of employees whose employer terminates its participation in the

pension plan.[4] Shepard A. Sheinkman, the Pension Fund's employee benefits consultant, explained that when an employer begins to make contributions the Pension Fund assumes an immediate debt for the past service credits assigned to the employees of such employer. Therefore, the fiscal integrity of the trust fund depends upon the "future stream of funding, or contributions" to pay not only for the current service credits but also to amortize the liability for past service credits. The premise is that the participation of a group will continue long enough to discharge that liability. Where that does not occur the deficiency must be made up by the remaining participating groups. Accordingly, Article IX is framed to minimize such deficiencies. "The

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[4]Effective July 1, 1973, the pension plan was amended to provide for the forfeiture of all credited service in such circumstances instead of only past service credit. This change was criticized in *Grover H. Norton and Yellow Freight System, Inc. v. I.A.M. National Pension Fund*, 553 F.2d 1352 (C.A.D.C., 1977), where the court stated:

> But, even assuming that forfeiture of past service credit might be necessary in some circumstances to protect the Fund, the Fund's integrity would not appear to be threatened by the payment of pensions based on future service credit, since such credit by definition is backed by employer contributions on the pensioner's behalf.

The explanation that had been offered to the court for the amendment was that "the trustees concluded that 'the continued soundness' of the Fund required an increase in covered employees' incentive to prevent withdrawal from the Fund by active contributing employers." However, the court observed that

> the increase in sanctions to the employee for a "withdrawal" from the Fund by his employer cannot be justified as a measure to provide the employee with an incentive to remain with his employer.

The described change was rescinded in October 1974 by further amendment of the pension plan so that as of the times involved herein the plan provided for forfeiture of only past service credit.

object of the termination provisions . . . is to limit the liability which arises from antiselection," i.e., voluntary withdrawal. Also, it furnishes an incentive for employees covered by the pension plan to prevent withdrawal from the plan by their employer.[5] In their brief the Pension Fund and the Trustees give the following explanation for inclusion in the plan of a provision for past service credit and why past service credit is forfeited when the contributing employer voluntarily withdraws from the plan but is not forfeited when such employer goes out of business:

> 1. The Trustees recognize that the social purposes for which funds such as this one are created are advanced by provisions permitting covered employees to earn pension credit for those parts of their working careers before employer contributions on their behalf began;
>
> 2. The Trustees further recognize that the Fund's ability to provide pension benefits based, in part, on such unfunded service is dependent on the Fund's ability to assure that employer contributions, once begun, will continue for the indefinite future, at their promised, expected levels;
>
> 3. The Trustees' ability directly to influence the necessary flow of contributions is severely restricted

[5]With reference to the 1973 amendment to the pension plan (see fn. 4, *supra*), the Pension Fund's administrator in an affidavit said:

> Since the actuarial soundness of the Fund depends in part on the assumption that contributing employers will continue to be obligated to make contributions to the Fund, the Trustees concluded that the continued soundness of the Fund required amendment of Article IX, Section 4 in a way which would increase the incentive for employees covered by the Fund to prevent, wherever possible, withdrawal from the fund by active contributing employers.

> by the nature of the trust they administer. Since contributions to the trust may lawfully be made only pursuant to collective bargaining obligations, affirmative control of the level and duration of employer contributions is committed by law exclusively to the collective bargaining parties;
>
> 4. The Trustees have therefore attempted to limit the Fund's potential unfunded liability by conditioning the right to benefit from past, or "un-paid for", service on the collective bargaining parties' continuation of and compliance with their contractual obligations to contribute to the Fund.
>
> 5. The Trustees recognize, however, that the objective of this qualification on the right to benefit from past service—namely, inducement of the collective bargaining parties to continue their participation in the Fund—is not served by applying the qualification in situations where a termination occurs because of the employer's cessation of doing business, a circumstance which is effectively beyond the control of the collective bargaining parties. The Trustees further recognize that one of the social purposes to be served by private pension funds such as this one is the provision of pension security which can, to some extent, survive the economic collapse of an employer. They have therefore elected to absorb any unfunded liability for past service remaining when a participating employer goes out of business, provided that the employer has had a participation history in the Fund of at least four years' duration.

D. *Conclusions*

The principal contention of General Counsel in these cases is that Article IX, section 4 of the pension plan is unlawful because it calls for the forfeiture of past service

credit when a contributing employer who continues in business terminates its participation in the plan but does not call for the forfeiture of past service credit when a contributing employer terminates its participation in the plan by going out of business. Maintaining this provision in effect and applying it to the employees of Dahl's and Baltimore Rebuilders is alleged as violations of Section 8(b)(1)(A) and (2).

Although neither employer has been charged, nevertheless, in order for General Counsel to prevail in these cases the evidence must establish a violation of Section 8(a)(3).[6] As stated in *The Radio Officers'* case:

> The language of Section 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.[7]

Thus, the two constituent elements of an 8(a)(3) violation are: (1) an unpermitted "discrimination"; and (2)

[6]Sec. 8(b)(2) requires "a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate Section 8(a)(3)." *The Radio Officers' Union of the Commercial Telegraphers Union, A.F.L. [A. H. Bull Steamship Company] v. N.L.R.B.*, 347 U.S. 17, 53 (1954). Accord: *N.L.R.B. v. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Independent [Valletta Motor Trucking Co., Inc.]*, 317 F.2d 746, 749 (C.A. 2, 1963).

[7]*The Radio Officers' Union [A. H. Bull Steamship Company], supra*, 42-43.

resulting unjustifiable encouragement or discouragement of union membership.

Was there unpermitted discrimination in these cases? General Counsel argues that with respect to the forfeiture of past service credit employees of employers who go out of business would be treated differently than were the employees of Dahl's and Baltimore Rebuilders. However, such difference is immaterial to these cases as the complaints herein allege specifically that Respondents caused Dahl's and Baltimore Rebuilders to discriminate against their respective employees. The issue as framed by the pleadings is that Dahl's and Baltimore Rebuilders by maintaining the pension plan in effect, during times within the Section 10(b) period, unlawfully discriminated against their respective employees within the meaning of Section 8(a)(3). The complaints herein make no reference to the treatment of employees of other employers. Accordingly, General Counsel's argument is not related to the pleadings in these cases.[8]

The term "discrimination" is not readily susceptible of abstract definition and there is no single definition that is universally applicable.[9] Unlawful discrimination has been found in varying circumstances. The more common examples of such discrimination are:

[8]Assuming that General Counsel's argument is within the scope of the complaints, I still would find the complained of features of the pension plan are not unlawful.

[9]*United Mineral & Chemical Corporation*, 155 NLRB 1390, 1415 (1965), enfd. in relevant part 391 F.2d 829 (C.A. 2, 1968). *See also* Shieber, *Section 8(a)(3) of the National Labor Relations Act; A Rationale: Part I. Discrimination*, 29 La. L. Rev. 46 (December 1968).

1. Treating like cases differently.[10] All Dahl's and Baltimore Rebuilders covered employees were similarly affected in regard to their pension benefits when the respective collective-bargaining agreements terminated.[11]

2. Penalizing or treating adversely employees for having exercised rights protected under Section 7.[12] See *Republic Aviation Corporation v. N.L.R.B.* and *N.L.R.B. v. Le Tourneau Company of Georgia*, 324 U.S. 793 (1945). When employees become covered by a pension plan of the type sanctioned by Section 302(c)(5) of the Act it is contemplated that their pension benefits will be limited or lost in the event that contributions to the plan on their behalf should be discontinued. (This may happen because in subsequent negotiations between their representative and their employer the contracting parties agree to eliminate pension contributions or because of the inability of their representative to obtain a renewal of the collective-bargaining agreement providing for pension benefits or because they may decertify their

[10] *Midwest Regional Joint Board, Amalgamated Clothing Workers of America, AFL-CIO v. N.L.R.B.*, ___ F.2d ___, 95 LRRM 2821, 2826 (C.A.D.C., 1977); *N.L.R.B. v. Collier*, 553 F.2d 425 (C.A. 5, 1977). *See* dissenting opinion in *N.L.R.B. v. Miranda Fuel Co., Inc.*, 326 F.2d 172, 181 (C.A. 2, 1963), where Judge Friendly stated: "Although 'In common parlance, the word [to discriminate] means to distinguish or differentiate,' 365 U.S. at 689 (dissenting opinion), it more often means, both in common and particularly in legal parlance, to distinguish or differentiate without sufficient reason."

[11] All covered employees under the pension plan are subject to the identical forfeiture of past service credit provisions. There is no difference in treatment of any covered employees and Art. IX (Termination of Participation) of the pension plan, in accordance with its terms, is applicable to all covered employees without difference or distinction.

[12] The converse is also true; i.e., rewarding employees for not engaging in protected activity.

collective-bargaining representative so that it no longer has authority to contract on their behalf.) Loss of past service credit in such case is not deemed unlawful adverse treatment of employees and there is no such contention in this case.[13] The vice here, as explained by General Counsel in his opening statement, is that past service credit continues for employees of employers who go out of business. However, this provision constitutes a potential benefit for, rather than adverse treatment of, Dahl's and Baltimore Rebuilders employees.[14] This follows because the pension plan calls for the forfeiture of the past service credit of employees whose employer terminates participation in the plan. An exception to such forfeiture in case the employer goes out of business is an advantage rather than a detriment to the employees. Viewed as of the time that Dahl's and Baltimore Rebuilders employees first became covered by the pension plan they are better off with a forfeiture provision that contains an exception because then they do not lose their past service credits rather than one which applies in all cases, regardless of the reason that their employer terminates participation in the plan.

[13] It is noted that where participation in the pension plan terminates because the employees' representative negotiates a collective-bargaining agreement which eliminates pension contributions or because the employees vote to decertify the union, that constitutes an exercise of Sec. 7 rights and the loss of past service credit is a penalty or adverse treatment arising from such action. Nevertheless, General Counsel's position in these cases, which for the purposes of this Decision I accept, is that the provision in the pension plan calling for the loss of past service credit upon termination of participation considered alone would not be unlawful.

[14] Favorable treatment of employees as an incident to their exercise of Sec. 7 rights normally is not considered unlawful. E.g., paying employees for time spent at grievance sessions; permitting employees to hold meetings on company property; granting employees leaves of absence to attend union conventions, etc.

While there is uncertainty about the meaning of "discrimination" I am of the opinion that under any acceptable definition of the term there is no discrimination in these cases within the meaning of Section 8(a)(3).

Also absent in these cases is the second element of the offense, namely, unjustifiable encouragement or discouragement of union membership. The availability of a pension plan such as the one in these cases which not only provides retirement benefits but also grants the covered employees liberal past service credit and which is available only to employees of employers who have collective-bargaining relationships with a participating union tends to encourage membership in such labor organization. Nevertheless, the negotiation of and maintaining in effect such plan does not constitute unlawful "encouragement." It is sanctioned by Section 302(c)(5) of the Act. Furthermore, as observed by the Supreme Court, "the union is a service agency that probably encourages membership whenever it does its job well."[15]

To maintain its financial integrity a pension plan must provide for a limitation upon the benefits for employees with respect to whom contributions cease to be made before their pensions mature. Abrogation of past service credit in such instance, as General Counsel points out in his brief, is "apparently contemplated in Section 3(37) of ERISA."[16] Thus, regardless of the reason for termination of an employer's participation in the pension plan (whether because the employees' representative

[15] *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [California Trucking Association] v. N.L.R.B.*, 365 U.S. 667, 675-676 (1961).

[16] *See* 29 U.S.C.A. Sec. 1002(37)(A)(iv).

negotiates a renewal collective-bargaining agreement that does not call for contributions to the pension plan or because the collective-bargaining relationship between the union and the employer comes to an end in consequence of a decertification proceeding or otherwise or because the employer goes out of business) the covered employees' loss of past service credit is not deemed unlawful and the fact that the pension plan contains specific provision for the forfeiture of past service credit in such instance is not deemed to constitute unlawful encouragement of union membership.

Respondent Unions in these cases offered the employees of Dahl's and Baltimore Rebuilders a pension plan with generous past service credit. The availability of such pension plan would tend to encourage employees in the first instance to seek membership in the Union in order that through the process of collective bargaining they might obtain a contract which would cover them under the plan. Once covered by the plan the potential loss of pension benefits, including the potential loss of past service credit, should their employer's participation terminate would tend to encourage the employees to continue their membership in the Union and to discourage action directed towards decertification of the Union as their representative. General Counsel concedes that this is not unlawful. An exception in the pension plan whereunder past service credit is not forfeited when the employer goes out of business is operative only after the employees have lost the freedom to select or not select a representative and therefore does not in any way change the degree by which the employees are encouraged to remain members of the Union or discouraged from seeking to decertify the Union while they are employed.

General Counsel argues in his brief that "the forfeiture provisions of Benefit Plan A of Past Service Credit is to induce employees to see that their employers continue to make contributions to Respondent Fund." This may be true. Although there is no evidence in these cases that the provision for forfeiture of past service credit was adopted for such purpose, as discussed above, even if it was, that alone would not constitute unlawful encouragement of union membership. As such forfeiture provision is lawful the consequential advantage that accrues to the Union, even if intended, does not render the provision unlawful. The purpose which General Counsel reads into the pension plan here to encourage employees to continue as members of the Union is not impermissible "encouragement" of union membership. The feature of the plan objected to by General Counsel, namely, the exception where an employer goes out of business, particularly as to the employees of Dahl's and Baltimore Rebuilders, would not affect their relative desire to remain members of the Union or to seek to decertify the Union as their representative and therefore does not constitute unjustifiable encouragement of union membership.

I find, for the reasons stated above, that the provisions of the pension plan herein complained of as maintained in effect by Dahl's and Baltimore Rebuilders constitute neither unpermitted discrimination nor unjustifiable encouragement or discouragement of union membership and therefore do not violate the Act.

General Counsel further argues that even if the provisions of the pension plan are lawful Respondents, nevertheless, have violated Section 8(b)(1)(A) by reason of the letters quoted above advising employees as to the consequence of their employers' termination of

participation in the plan. According to General Counsel, "the fact [is] that the employees were advised that the forfeiture took place not because their employer ceased to be obligated to make contributions and thereafter continued in the same or related business, but rather because the employees *choose* to decertify the I.A.M. Such a statement has a direct and foreseeable consequence of inhibiting employees in the exercise of their Section 7 rights." However, contrary to General Counsel, the letters merely point out that the consequence of the decertification of the Union is to terminate participation of the contracting employer in the pension plan and as a result the covered employees' pension benefits will be affected in the manner described. Such statement which fairly describes to the employees their status in regard to pension benefits in consequence of the decertification action does not constitute a threat or an unlawful utterance under the Act.

I find that Respondents have not engaged in any of the unfair labor practices alleged in the complaints. In view of this finding it is unnecessary to consider the various affirmative defenses interposed by Respondents.

CONCLUSION OF LAW

Respondents have not engaged in the unfair labor practices alleged in the complaints herein.

Upon the basis of the foregoing findings of fact, conclusion of law, and the entire record in these proceedings, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[17]

The complaints herein are dismissed in their entirety.

/s/ Herbert Silberman
Administrative Law Judge

Dated, Washington, D.C., December 27, 1977

[17]In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX C

235 NLRB No. 209

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 5-CB-2096

LODGE #199 OF DISTRICT #12, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO; INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO; I.A.M. NATIONAL PENSION FUND AND ITS TRUSTEES, AGENTS OF THE AFOREMENTIONED UNIONS

and

BALTIMORE REBUILDERS, INC.

Case 5-CB-2211

LODGE 170, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO; INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, AGENT OF RESPONDENT; I.A.M. NATIONAL PENSION FUND AND ITS TRUSTEES, AGENTS OF RESPONDENT (Dahl's Auto Reconstruction Company, Inc.)

and

ROSWELL K. PETERSON and EARL KELLEY,
Individuals

DECISION AND ORDER

On December 27, 1977, Administrative Law Judge Herbert Silberman issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent Unions filed exceptions and a supporting brief, and Respondent I.A.M. National Pension Fund filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C., May 8, 1978.

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1369

[Filed: Dec. 28, 1979]

BALTIMORE REBUILDERS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

I.A.M. NATIONAL PENSION FUND
and
TRUSTEES OF THE I.A.M. NATIONAL PENSION FUND,
Intervenor.

CENTER OF NATIONAL LABOR POLICY,
Amicus Curiae.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

THIS CAUSE came on to be heard upon the petition of Baltimore Rebuilders, Inc., for review of an order issued against it by the National Labor Relations Board on May 8, 1978, in proceedings before the said Board

known upon its records as Case No. 5-CB-2096; and upon the certified list and transcript of proceedings and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the petition for review be, and it is hereby denied.

/s/ William K. Slate, II
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1369

BALTIMORE REBUILDERS, INC.,
Petitioner,

v.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued: May 9, 1979 Decided: December 28, 1979

Before FIELD, Senior Circuit Judge, WIDENER and HALL, Circuit Judges.

HALL, Circuit Judge,

Baltimore Rebuilders, Inc. ("Rebuilders") petitions to have set aside an order of the National Labor Relations Board (the "Board") dismissing a complaint issued against the International Association of Machinists and Aerospace Workers, AFL-CIO (the "Union") and its pension fund, the I.A.M. National Pension Fund (the "Fund"). 235 N.L.R.B. No. 209 (1978). The complaint alleges that the maintenance and enforcement of certain

pension plan provisions have unlawfully coerced and restrained Rebuilders' employees in the exercise of the right to vote to decertify the Union as their collective bargaining representative. Section 8(b)(1)(A) and (b)(2) of the National Labor Relations Act (the "Act"), 29 U.S.C.A. § 158(b)(1)(A) and (b)(2).

We think the complaint was properly dismissed because there is no evidence of an intention to violate the Act appearing on the record before the Board or from the provisions themselves. The cancellation provisions, on their face and as here applied, are not discriminatory or coercive. Their impact on employee voting rights is indirect and they serve a legitimate business purpose of the Fund. Accordingly, we deny Rebuilders' petition.

I. UNION PENSION PLAN

A. *The Pension Fund*

The Fund was created in 1960 to provide retirement benefits to employees who are represented by the Union's locals. There are approximately 2000 employees making contributions for 90,000 union-represented employees. The Fund is not administered by the Union.[1] It is controlled by an independent board of trustees whose membership is made up of an equal number of union and employer representatives.[2] Pension policy is set by this

[1]At the outset, we note the Fund has vigorously objected before the Board and on appeal to any holding that presumes the Fund to be an agent of the Union. Because we hold the pension plan provisions at issue do not violate the Act in any event, we reserve decision about whether pension policies generally fall within the strictures of the Act.

[2]The Labor-Management Relations Act, Section 302, prohibits payments from employers to employee representatives except under enumerated exceptions, one of which is for pension payments made by written agreement to trust funds which must

board and it is generally subject to federal statutory regulation.[3]

B. *Work Time Credits: Earned and Unearned*

At issue is the plan's scheme for work time credits which each employee must accumulate for entitlement to pension benefits. The plan allows full-scale pension benefits to covered employees on the basis of their total years of service without regard to when their employer began making contributions to the Fund. Once commenced, pension benefits are paid whether or not the pensioner's former employer continues to make contributions.[4] This scheme poses a generous unfunded benefit to employees who retire soon after the employer begins contributions for their unit, and it poses a significant liability to the Fund if for any reason the employer's expected "stream of contributions" ceases.

Two kinds of work credits may be applied toward a pension entitlement. "Past Service Credits"[5] are granted on a unit-wide basis when an employer makes its first contribution to the Fund. The number of these credits, which are accrued by each employee on that date, equals his months of previous employment with the employer. When contributions cease, these credits are cancelled. "Future Service Credits"[6] are earned for each month

be administered with equal representation of employers and employees. Section 302(c)(5), 29 U.S.C.A. § 186(c)(5).

[3]*See* Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.A. § 1001 *et seq.*

[4]If an employer's contributions for the unit as a whole are for less than four years, pension benefits may be reduced. Art. IX, §§ 3 and 4d; *see* Note 10, *infra.*

[5]Art. III.

[6]Art. IV.

the employee works after that date so long as the employer continues making contributions for the unit.

The Administrative Law Judge hearing the complaint found that this scheme of earned and unearned credits allowed older, long service employees to receive full pension benefits, although their employer's payments over the years remaining before they retired could not be expected to pay for the Fund's liability for their pensions. For example, it was found that a twenty-five year employee could earn a full pension although his employer had joined the plan only one year before he retired—by adding one year of Future Service Credits to his twenty-four years of Past Service Credits.[7]

The liability to the Fund represented by these unearned credits is greatest when the employer commences coverage and diminishes as contributions continue since all credits accruing after the initial contribution date are earned Future Service Credits.

C. *Employer Participation/Unit-Wide Cancellation of Unearned Credits*

The employer's participation in the plan continues only so long as its employees continue to bargain through a local to include a pension contribution clause in their collective bargaining agreement.[8] The contribution clause obligates the employer to make unit contributions, at an agreed rate, as part of the benefits package which will be effective during the term of the contract. The agreed rates of contribution may change from contract to contract, with the level of benefits payable upon

[7]Art. IV, §§ 1, 4, and 5.

[8]*See* 29 U.S.C.A. § 1002(37)(ii).

retirement generally set by the highest rate of contribution—not the most recent rate.[9]

The cancellation provisions[10] provide that when an employer's participation in the Fund terminates (and its

[9]Art. V, § 3(a) and (c).

[10]Art. IX: TERMINATION OF PARTICIPATION.

Section 1. General.

The financing of the benefits provided by the Plan is based on the continued contributions from Contributing Employers, as required in the Collective Bargaining Agreements. If a Contributing Employer should fail to make the required contributions, the Pension Plan cannot be continued for the employees of such employer.

In addition, if a Lodge [local] and an employer should enter into a Collective Bargaining Agreement requiring contributions to the Fund, and one or more employees of such Contributing Employer should then retire under the provisions of the Plan, the obligation to contribute to the Plan should continue in effect for a sufficient period of time to enable the Plan to operate on an actuarially sound basis. The purpose of this Article is to set forth the basis for terminating the participation in the Plan of Contributing Employers who are delinquent in their contributions to the Plan, and the basis for termination of Credited Service and pension benefits for employees of delinquent employers. In addition, this Article contains the basis for the Trustees to impose penalties by way of denial of pension benefits and Credited Service for employees of employers who, under certain circumstances, do not continue to be obligated to contribute to the Fund in accordance with their Collective Bargaining Agreement with the Lodge [local].

Section 2. Causes of Termination.

The participation of a Contributing Employer shall terminate:

a. When the employer is no longer obligated by a Collective Bargaining Agreement to make contributions to the Fund on the basis required by the Trustees; or

b. When the Employer fails to pay an amount due the Fund, and termination is deemed appropriate by the Trustees; or

c. When the employer fails to comply with administrative procedures adopted by the Trustees and termination is deemed appropriate by the Trustees. [footnote continued]

contributions necessarily cease), all Past Service Credits

Section 3. Short Term Contributing Employers.

If within 48 months of its Contribution Date the participation of a Contributing Employer terminates and that employer goes out of business, or within 48 months of its Contribution Date the number of Covered Employees employed by the Contributing Employer at any time is less than 50 percent of the original number employed on the Contribution Date of the Contributing Employer, then the following actuarial limitations shall apply:

a. Pensioners who formerly were employed by the Contributing Employer shall have their pensions terminated or reduced, if the total amount contributed by the said Contributing Employer, less benefit payments already made, is less than the actuarially determined value of the pension benefits thereafter payable with respect to such Pensioners; and

b. Covered Employees employed at any time by the Contributing Employer shall have their benefits terminated or altered in such manner as the Trustees consider necessary to preserve an actuarially sound relationship between the liability for benefits anticipated for the said Covered Employees involved and the contributions of the said Contributing Employer, after taking into account the existing liabilty to Penioners who formerly were employed by the Contributing Employer.

This Section shall not apply to any Covered Employee who has at least five years of Future Service credit before a break in Covered Employment occurs under Section 3 of Article IV.

Section 4. Withdrawal by Active Employers.

a. If the participation of a Contributing Employer terminates and should that employer, or its successor, thereafter continue in the same or related business, then all credited Service based upon employment with such employer shall be cancelled retroactively, notwithstanding any contrary provision of this Plan.

b. Credited Service shall not be cancelled for the following persons:

(1) Covered Employees whose employment with such employer had ended at least 24 months before the participation of the Contributing Employer terminates; or

(2) Covered Employees whose employment with such employer ends within thirty (30) days of the employer's termination; or

(3) Covered Employees in a bargaining unit which is transferred to the jurisdiction of another I.A.M. Lodge [local], provided that: [footnote continued]

are cancelled for active employees.[11] On the date contributions cease these provisions take away the same benefit that was granted on the date contributions began.

Cancellation is effective on a unit-wide basis and is automatic. No discretion is allowed to the Fund to prevent cancellation for any employee or unit. Active employees are affected regardless of union affiliation or activity. All units suffer the same consequence, whether or not they continue to be represented by a Union local. One exception exists for units when the employer drops out of the Fund and does not continue operating his present or a related business. Employees of such discontinued units are excepted from cancellation.[12]

Once cancelled, working employees may reactivate their credits by changing employement: if the employee

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i) No member of that Lodge [local] is a Covered Employee under this Plan; and

ii) The employee's rights under this Plan are vested under Article IV, Section 4; and

iii) Pension benefits under this Plan are not duplicated under another pension plan.

c. Covered Employees shall have their Credited Service reinstated if they earn at least five years of Future Service credit at any time within the eight (8) year period following the date the participation of the Contributing Employer terminates.

d. Pensioners shall not lose their Credited Service if their benefits were effective before the participation of the employer terminates; provided, however, that if the participation of the employer terminates within 48 months of its Contribution Date, then all pensions based upon Credited Service with that employer shall be ended or reduced if the total amount contributed, less benefit payments already made, is less than the actuarially determined value of the pension benefits thereafter payable with respect to such Pensions.

[11]Pensioners are excepted from cancellation. Art. IX, § 4d. *See* Notes 4 and 10, *supra.*

[12]Art. IX, § 4a. *See* Note 10, *supra.*

terminates within 30 days of the employer's termination of unit coverage or if they work under covered status in five of the next eight years.[13] Also, if the employer recommences participation in the Fund within a few years, the cancelled credits could be automatically reactivated for the unit.[14]

II. CANCELLATION OF UNEARNED CREDITS FOR REBUILDERS' UNIT

Rebuilders is engaged in the manufacture and wholesale distribution of rebuilt carburetors in Baltimore, Maryland. In late 1969, the Union's local, Lodge #199, District #12, was certified by the Board as the collective bargaining representative of Rebuilders' production and maintenance employees. Several months later a three-year collective bargaining agreement was executed obligating Rebuilders to commence contributions in the last year of the contract. Contributions were made for that year and a second three-year contract was entered into requiring the contributions to continue during its term. When this contract expired, Rebuilders and the local failed to reach a third agreement. A strike ensued, and three months later the local lost a decertification election, making renewal of the pension contribution clause an impossibility.

[13]Also, the plan allows other limited individual employee exceptions to the unit-wide cancellation rule. They apply to employees who already have changed employment at least 24 months before unit coverage ends, art. IX §4b(1), and to those whose unit is transferred to a different Union local where no other "Covered Employee" of the plan is a member and the transferee's rights are vested (by his having at least attained age 50 and earned ten years credited service, of which 5 years must be for Future Service Credits), art. IV, §4b. *See* Note 10, *supra*.

[14]Art. IX, §4c. *See* Note 10, *supra*.

Four months after the election, the Fund administrator sent to Rebuilders and its employees letters[15] officially notifying them that the effect of the decertification vote was to terminate Rebuilders' participation in the plan causing referenced provisions of the plan to apply, including the cancellation provisions at issue. The effective date of cancellation was first stated to be the date the last contribution was received by the Fund but a second letter on the same form corrected this error, stating that the effective date was the expiration date of the collective bargaining agreement.

[15]The letter form, dated August 24, 1976, is captioned, "Termination of Participation, Article IX, Section 4" and reads, in pertinent part,

> We have been advised that the I.A.M. bargaining unit employees of Baltimore Rebuilders, Inc. have decertified I.A.M. District Lodge No. 12 as their bargaining agent. The effect of this is to terminate participation and pension coverage for the Covered Employees of Baltimore Rebuilders, Inc. The effective date of termination is January 29, 1976, the expiration date of the last collective bargaining agreement. Under Article IX, Section 4 of the Rules and Regulations of the I.A.M. National Pension Fund, Benefit Plan A the following shall apply:
>
> 1. For Covered Employees of Baltimore Rebuilders, Inc. all Past Service Credit based on employment with the employer shall be cancelled retroactively notwithstanding any contrary provision of the Plan.
>
> 2. Past Service shall not be cancelled for any Covered Employee whose employment with such employer terminates within 30 days of the employer's termination (by February 29, 1976), OR if the Covered Employee terminated his employment 24 months prior to the company's termination of participation date.
>
> 3. Covered Employees shall have their Past Service Credit reinstated if they earn at least five (5) years of Future Service Credit at any time within the eight (8) year period following the Termination of Participation.

III. DISCUSSION

A difficult issue is presented because we are asked to review a complex union-sponsored pension plan which serves the purpose of pension plans generally (and unions specifically) to provide generous benefits to employees, in the context of the Act's prohibitions against penalizing employees in the free exercise of organizational rights.[16] No issue of discriminatory representation is present. The substance of Rebuilders' charge is that, in the context of a decertification election, the structure of the pension plan and its automatic cancellation rules effectively overwhelm and dictate the collective choice of unit employees to elect continued representation by the Union's locals.

The Act is intended to insulate employees' rights to employment from the exercise of their organizational rights, *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 40 (1954), and to assure than when union membership or unit representation is elected it is done so by a process of free choice. Illegal are actions calculated to inhibit that process. However, the mere creation of a benefit so valuable that predictably it will be elected by a free and rational choice does not violate the Act.

> It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects. For example, an employer may discharge an employee because he is not performing his work adequately, whether or not the employee happens to be a union organizer. *See National Labor Relations Board v. Universal Camera Corp.*, 2 Cir., 190 F.2d 429. Yet a court could hardly reverse a Board finding that such firing would foreseeably tend to discourage union activity. Again, an employer can properly make the existence or amount of a year-end bonus depend upon the productivity of a unit of the plant, although this will foreseeably tend to discourage the protected activity of striking. *Pittsburgh-Des Moines Steel Co. v. National Labor Relations Board*, 9 Cir., 284 F.2d 74. A union, too, is privileged to make decisions which are reasonably calculated to further the welfare of all the employees it represents, nonunion as well as union, even though a foreseeable result of the decision may be to encourage union membership.
>
> *Local 357, Teamsters v. N.L.R.B.*, 365 U.S. 667, 679-80 (1961) (Mr. Justice Harlan concurring).

To determine whether conduct falls within the statutory ban, "it is the 'true purpose' or 'real motive' which constitutes the test." *Local 357, Teamsters v. N.L.R.B.*, 365 U.S. at 675, quoting from *Radio Officers' v. N.L.R.B.*, 347 U.S. at 43. Proof of subjective motive can, in limited situations, be made out from the conduct itself, *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 227-28 (1963); however, where the impact on protected rights is slight or indirect, or where it may be explained by reference to other lawful considerations, " 'it is prima facie lawful,' and an affirmative showing of improper motivation must be made." *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967).

[16] The Fund's work credit cancellation provisions have been reviewed by another circuit court in the context of a law suit against the Fund for arbitrary denial of pension benefits. *Norton v. I.A.M. Nat. Pension Fund*, 553 F.2d 1352, 1358, N.8 (D.C. Cir. 1977). The issue here, on review of an alleged violation of the Act, was not considered by that court and the facts regarding the Fund's need to cancel unpaid credits were presumed true for the decision in that case.

Here, the Board's hearing developed no evidence of an intention to violate the Act. The Fund administrator testified that the intent of the cancellation provisions was to increase the incentive for employees covered by the Fund to prevent, whenever possible, withdrawal from the Fund by active employers. (App. Ex. 62; Tr. 168-70). In regard to the Fund's enforcement of the provisions, the letters notifying employees of cancellation, were found by the Administrative Law Judge to be only informational. Their tone was not threatening. We note that since the letters were mailed well after the election, there can be no contention that the timing of their receipt by employers was coercive.

Only the plan's terms are left for scrutiny. On their face they evidence no impermissible intent. They are not discriminatory or coercive. *Rosen v. N.L.R.B.*, 455 F.2d 615 (3d Cir. 1972); *Local No. 167, Progressive Mine Workers v. N.L.R.B.*, 422 F.2d 538 (7th Cir.), *cert. denied* 399 U.S. 905 (1970). They operate evenly against all unit employees regardless of their personal preference to keep or dismiss the union. They operate automatically when the possibility of continuing contributions is lost.

Union-sponsored pension plans are well-established as important services which unions should provide to employees as part of the benefits they bring to the process of employee representation and collective bargaining. Congress has expressly recognized that such pension plans can pay pensions based on a scheme of earned and unearned work credits. 29 U.S.C.A. § 1002 (37)(A). When a union is vying for certification, the scheme has the same impact on organizational rights as when the union seeks to prevent decertification. It poses a significant inducement to older loyal employees

to vote for the union in order to obtain the union's pension coverage. But, the scheme also advances the liberal social purposes of any pension plan both to encourage its adoption on a broad financial base and to pay early, full-scale benefits to all employees as they retire—not just to those who will retire after contributions can pay for the liability of their pensions.

What Congress authorizes we cannot outlaw. It has authorized just such a scheme and we do not think a reasonable limitation on the unfunded liability represented by it can violate the Act. *See* 29 U.S.C.A. § 1001(b). The reasonableness of the limitation here is shown by the fact that credits are cancelled automatically when contributions end.

By the requirement that unit contributions be part of the benefits package negotiated in the collective bargaining agreement, the plan allows several events to announce the end of unit contributions—only one of which is decertification of a local. For example, local and employer may agree to join another pension plan (which might offer the same inducement to join which is here cancelled), or they may agree to eliminate pension benefits from their contract in favor of higher wages or more immediage benefits. The economic and social conditions playing upon such negotiations are as varied as they are unpredictable. But, in those cases, cancellation is effective and the local continues to represent the unit.

We must note that because coverage is voluntary and is tied to the term and negotiation of each contract, if employees are willing to trade away pension benefits, the cancellation provisions effectively "penalize" the Union representatives, not the employer.

In the context of a decertification vote, the impact of cancellation is only one factor to be considered by employees and may have little impact on the election. If a second union vies to represent the unit, its pension fund may offer credits similar to those subject to cancellation. Only voting employees who were working on the initial contribution date have accrued any credits which can be cancelled. Each year of contributions reduces the ratio of unearned to earned credits for such employees, as well as for the unit as a whole. Consequently, the longer the contributions have continued, lesser is the impact of cancellation. Again, cancellation is only one of many factors involved in the collective decision to decertify. Contrary to Rebuilders' assertion, cancellation cannot dictate the outcome of that vote, nor can it overwhelm or intimidate an individual employee in the free exercise of his right to vote for or against the local's representation.

We think the challenged provisions evidence an intention to encourage the voluntary continuation of pension coverage on a unit-wide basis. As such, they serve a legitimate business purpose of the Fund to reasonably limit an unfunded liability. Any effect cancellation may have on protected employee rights is consequential, flowing from the nature of the pension plan to provide voluntary and generous benefits from contract term to contract term.

The exceptions to cancellation when unit contributions end support this conclusion. When an employer quits his business, all employees lose their jobs and no voluntary decision remains. If the employer changes business operations, the nature of the bargaining unit changes, employees may lose or change jobs, and the attractiveness of voluntary pension coverage wains

until stability in the unit is restored. In such cases, inducements to continue contributions are likely to be unavailing and cancellation in fact would take on the nature of a "penalty" to those employees.

Likewise, when individual employees change employment, the possibility of cancellation of their credits cannot effect a decision to continue unit coverage. Rebuilders contends that the exceptions for individual employees raise the specter of rewarding "union faithful" who leave a shop, especially within 30 days of decertification. But we note that, as in Rebuilders' shop, when the decertification vote is beyond 30 days from the end of contributions (the contract term), any pro-union employee who may leave will suffer cancellation along with the "employer faithful," because his termination must be within 30 days of the end of contributions—rather than the date of the decertification vote.

In all, we think automatic cancellation of the credits when contributions cease is a reasonable pension plan provision which operates fairly to induce the voluntary continuation of pension coverage. As where a union's activities and the quality of its services attract employees to membership, we think the very existence of a union-sponsored pension plan encourages union representation.

> The very existence of the union has the same influence. When a union engages in collective bargaining and obtains increased wages and improved working conditions. its prestige doubtless rises and, one may assume, more workers are drawn to it. When a union negotiates collective bargaining agreements that include arbitration clauses and supervises the functioning of those provisions so as to get equitable adjustments of grievances, union membership may also be encouraged. The truth is that the union is a service agency that probably

encourages membership whenever it does its job well.

Local 357, Teamsters v. N.L.R.B., 365 U.S. at 675-76.

Accordingly, the petition to review the Board's order is denied.

PETITION DENIED